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Supreme Court of the United States

OCTOBER TERM, 1938

No. 75

GWIN, WHITE & PRINCE, INC.,
Appellant,

vs.

HAROLD H. HENNEFORD, THOMAS S. HEDGES and T. M. JENNER, Constituting the State of Washington Tax Commission.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF APPELLANT

FRANK S. BAYLEY,
CARL E. CROSON,
OFELL H. JOHNSON,
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900 Insurance Building,
Seattle, Washington.

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BRIEF OF APPELLANT

This is an appeal from the Supreme Court of the State of Washington. Statement as to jurisdiction was duly filed under Paragraph I of Rule 12 of the Revised Laws of the Supreme Court of the United States and probable jurisdiction was noted by this Court on October 10, 1938. The opinion in the Court below was reported in 193 Wash. 451; 75 Pac. (2d) 1017.

STATEMENT OF THE CASE

Appellant in this action seeks to enjoin the imposition upon its gross receipts of the so-called Business and Occupation Tax created by Chapter 191, Laws of Washington, 1933, as amended by Chapter 57, Laws of Washington, Extraordinary Session, 1933, as amended by Chapter 180, Laws of Washington, 1935. (Appendix I.) This case is submitted upon appellant's complaint (R. 1) and appellees' demurrer thereto (R. 13), and the additional facts stipulated to by the parties (R. 4).

The facts alleged in appellant's complaint and admitted by appellees' demurrer are that appellant is a Washington corporation, engaged in the business of marketing apples and pears produced in the States of Washington and Oregon. The appellant acts solely as agent of various growers and grower organizations in these states and in the performance of its duties makes sales and deliveries of the fruit produced by these growers, pursuant to contracts entered into by it with buyers located in the several states and in foreign countries. The appellant collects the sales price and remits the net balance, with its accounting therefor, to the above mentioned growers and grower organizations. These sales and shipments all are made in interstate or foreign commerce, with the exception of an occasional and insignificant sale within the State of Washington.

To appellant's complaint appellees demurred and it was subsequently stipulated that the matter be submitted to the trial Court on the merits on appellees' demurrer, together with the additional stipulated fact that appellant transacts its entire Washingon State business under written contract with the Wenatchee-Okanogan Cooperative Federation, a full and true copy of which contract was attached to the stipulation marked Exhibit "A" (R. 5). This contract provides that the Wenatchee-Okanogan Cooperative Federation has appointed appellant its "exclusive agent to sell and collect the proceeds from sales of all commercially packed apples and pears which shall come into the possession or control of the Federation as agent for its members." (R. 5.) The appellant is bound by this contract to sell the products mentioned and to obtain the widest possible distribution thereof; to inform the Federation and its members as to marketing conditions; to permit the investigation of its books and records by the Federation or its members; to be responsible for collections upon all sales made by appellant on all shipments where the bill of lading runs to appellant or its order; to handle all traffic matters pertaining to shipments and to attend to the collection of claims against carriers or others, and appellant is bound not to engage in any speculative business on its own behalf. The price at which the Federation's products are sold by

appellant is fixed by the Federation, but appellant's compensation is fixed by the contract at 8c per box for apples and 9c per box for pears. Appellant, in the furtherance of its duties, maintains sales representatives at many points outside the State of Washington, both within the United States and in foreign countries, who not only negotiate sales but who also execute written contracts of sale in appellant's name and in its behalf at their respective places of business outside of the State of Washington.

In the further performance of its duties appellant sends to its representatives outside the State of Washington daily bulletins listing cars of fruit which are for sale and, during the fruit season, expends large sums of money on telegraph, telephone, and cable communications with its extrastate representatives and buyers, all of which are in interstate and foreign commerce, The appellant gives shipping directions to the respective growers and sellers and handles all of the bills of lading on shipments, most of which are actually consigned to appellant at extrastate destinations. Upon arrival of the fruit at its destination appellant attends to the delivery of shipments and the collection of the proceeds therefrom, all of which transactions are carried on in the course of interstate and foreign commerce. The entire gross income of appellant is derived from the interstate and foreign transactions above set

out and is measured directly by the volume, and not the price, of sales made. Appellant's complaint further alleges (R. 3) that the enforcement and collection of the business tax by the appellees is as to this appellant an illegal burden upon interstate and foreign commerce in violation of the Commerce Clause of the Federal Constitution and its provisions prohibiting the state's levying an impost upon exports.

After the hearing of oral arguments and the submission of briefs, the trial court made and filed its memorandum opinion stating that the appellees' demurrer would be sustained "not upon the ground that the plaintiff is not engaged in interstate commerce but upon the ground that it is a domestic corporation and that the tax levied is not a tax upon interstate commerce but upon the privilege of the domestic corporation to exist in this state." (R. 13.) The court thereupon entered its order sustaining appellees' demurrer (R. 14), and the appellant having elected to stand upon its complaint, the court entered judgment dismissing the complaint and allowing the appellant's exception thereto. (R. 14.) Appeal was thereafter in due course taken to the Supreme Court of the State of Washington and briefs having been filed and oral argument heard, the Court called for rehearing before the entire Court sitting en banc. (R. 17.) Thereafter on February

9, 1938, the Court rendered its decision upholding the action of the trial court, and filed its opinion (R. 17) together with the dissenting opinion of a minority of the members of the Court. (R. 24.)

This appeal to the United States Supreme Court was thereupon promptly and in due course taken.

ASSIGNMENT OF ERRORS TO BE URGED HEREIN

1. The Supreme Court of the State of Washington by its judgment erred in failing to hold that the operations of the appellant in selling and distributing throughout foreign states and countries, and collecting the sales price of fruit grown in the State of Washington, form an essential and component part of interstate and foreign commerce. (R. 29.)

2. The Supreme Court of the State of Washington erred in failing to hold that appellant is engaged solely in interstate and foreign commerce. (R. 29.)

3. The Supreme Court of the State of Washington by its judgment erred in holding that the imposition upon and collection from the appellant of the Business and Occupation Tax (Chapter 191, Laws of Washington, 1933, as amended by Chapter 57, Laws of Washington, Extraordinary Session, 1933, and Chapter 180, Laws of Washington, 1935) upon its gross income, is

not a tax or duty laid upon articles exported from the State of Washington in violation of Article 1, Section 9, Clause 5, of the Constitution of the United States. (R. 29.)

4. The Supreme Court of the State of Washington by its judgment erred in holding that the imposition upon and collection from the appellant of the said Business and Occupation Tax upon its gross income, does not constitute an impost or duty on exports in violation of Article I, Section 10, Clause 2 of the Constitution of the United States. (R. 30.)

5. The Supreme Court of the State of Washington by its judgment erred in failing to hold that the imposition of the said Business and Occupation Tax upon appellant's gross income is an unlawful and illegal burden, hindrance, and obstruction upon interstate and foreign commerce in violation of Article I, Section 8 of the Constitution of the United States. (R. 30.)

6. The Supreme Court of the State of Washington by its judgment erred in affirming the judgment of the Superior Court of Thurston County, Washington, denying the injunctive relief against the imposition and collection of the said Business and Occupation Tax upon the appellant's gross income and in dismissing the action filed by the appellant and granting judgment in favor of the appellees. (R. 30.)

7. The Supreme Court of the State of Washington by its judgment erred in failing to grant to appellant the relief sought in this action and in failing to grant judgment in its favor. (R. 30.)

NATURE OF STATUTES INVOLVED

These statutes (Appendix 1) have been before the Supreme Court of the State of Washington and before this Court in several cases. From these decisions the nature and character of the tax is now firmly established. The tax is not a property tax. It is an excise or occupation tax imposed upon the *privilege* of doing business. The tax is imposed for *revenue*, not for *regulation*. The tax is measured by and imposed upon *gross receipts* derived from the doing of business.

State ex rel. Stiner v. Yelle, 174 Wash. 402, 25 Pac. (2d) 91;

Supply Laundry v. Jenner, 178 Wash. 72, 34 Pac. (2d) 363;

Pacific Telephone & Telegraph Co. v. Tax Commission, 183 Wash. 697, 48 Pac. (2d) 938, affirmed 297 U. S. 403;

Fishers Blend Station v. State Tax Commission, 182 Wash. 163, 45 Pac. (2d) 942, reversed 297 U. S. 650;

Paramount v. Henneford, 184 Wash. 376, 51 Pac. (2d) 385; Certiorari denied 298 U. S. 665;

Puget Sound Stevedoring Co. v. Tax Commission, 189 Wash. 131, 63 Pac. (2d) 532, reversed 302 U. S. 90.

SUMMARY OF ARGUMENT

It is argued that the negotiation of sales and the sale of goods to be shipped in commerce among the states and with foreign nations is interstate or foreign commerce; that appellant's principal, if it were to perform the duties it delegates to appellant, would be engaging in interstate and foreign commerce, wherefor appellant is likewise in and a part of such commerce even though an agent or independent contractor; that a tax upon gross receipts is a direct tax upon the acts done by the person sought to be taxed, and, in appellant's case, upon acts done in interstate and foreign commerce; therefore, that the imposition of the tax in question upon appellant's gross receipts is unlawful and in violation of the constitution of the United States, and constitutes an impost or tax upon exports and a direct burden upon commerce among the several states and with foreign nations. The argument is concluded by a discussion of the opinion of the State Supreme Court and the cases relied upon by that Court in reaching its decision.

ARGUMENT

A

THE NEGOTIATION OF SALES AND THE SALE OF GOODS TO BE SHIPPED IN COMMERCE AMONG THE STATES AND WITH FOREIGN NATIONS IS INTERSTATE OR FOREIGN COMMERCE.

The word "Commerce," as used in the Constitution of the United States, is inclusive not only of the actual transportation involved, but also comprehends every species of commercial intercourse among the several states. As stated in the case of *Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 282, 290, 66 L. Ed. 239, 244,

> "... where goods are purchased in one state for transportation to another, the commerce includes the purchase quite as much as it does the transportation. *American Exp. Co. v. Iowa*, 196 U. S. 133, 143, 49 L. Ed. 417, 422, 25 Sup. Ct. Rep. 182. This has been recognized in many decisions construing the commerce clause. Thus it was said in *Welton v. Missouri*, 91 U. S. 275, 280, 23 L. Ed. 347, 349: '"Commerce" is a term of the largest import. It comprehends intercourse for the purposes of trade in any and all its forms, including the transportation, purchase, sale, and exchange of commodities'."

In *Carter v. Carter Coal Co.*, 298 U. S. 238, 80 L. Ed. 1160, it was stated at page 303, 1185, that:

> "So far as (the manufacturer) sells and ships, or contracts to sell and ship, the commodity to customers in another state, he engages in interstate commerce."

The negotiation of sales of goods which are in one state, for the purpose of introducing them into the state in which the negotiation is made, is interstate commerce. *Robbins v. Shelby County Taxing District,* 120 U. S. 489, 30 L. Ed. 694. *Hopkins v. United States,* 171 U. S. 578, 43 L. Ed. 290; and no distinction is made between buying and selling, or between buying for transportation to another state and transporting for sale in another state.

> "Quite to the contrary, the import of the decisions has been that if the transportation was incidental to buying or selling, it was not material whether it came first or last." *Dahnke-Walker Milling Co. v. Bondurant, supra,* at page 291, 244.

For further discussion of commerce, see also

United States v. E. C. Knight Co., 156 U. S. 1, 13; 39 L. Ed. 325, 329;

Real Silk Hosiery Mills v. Portland, 268 U. S. 325, 69 L. Ed. 982;

Crenshaw v. Arkansas, 227 U. S. 389, 57 L. Ed. 565;

Adair v. United States, 208 U. S. 161, 52 L. Ed. 436;

Gibbon v. Ogden, 9 Wheat. 1, 6 L. Ed. 23;

Federal Trade Commission v. Pacific States Paper Trade, 273 U. S. 52, 71 L. Ed. 534, and the cases cited therein.

Although the above cases relate principally to commerce among the states we submit that there is no difference between this and foreign commerce so far as the present question is concerned.

Crew Levick Co. v. Pennsylvania, 245 U. S. 292; 62 L. Ed. 295.

B

WHERE APPELLANT'S ACTS, IF DONE BY ITS PRINCIPAL, CONSTITUTE INTERSTATE AND FOREIGN COMMERCE, THEY ARE LIKEWISE SO WHEN DONE BY APPELLANT.

That appellant's principal is engaged in interstate and foreign commerce is not only apparent from the facts, but was granted by the Supreme Court of the State of Washington. (R. 22, 23.) If appellant's principal is engaged in interstate and foreign commerce, and would be exempt from tax if it did precisely that which it employs appellant to do, then regardless of whether appellant is denominated an agent or an independent contractor, appellant is engaged in interstate and foreign commerce.

> "The fact is not important that appellant does business as an independent contractor as long as the business that it does is commerce immune from regulation by the states. *What is decisive is the nature of the act, not the person of the actor.*" *Puget Sound Stevedoring Co. v. Tax Commission,*

302 U. S. 90, 82 L. Ed. Adv. Op. 64, reversing 189 Wash. 131. (Italics ours.)

Furst v. Brewster, 282 U. S. 493; 75 L. Ed. 478.

Under the allegations of appellant's complaint, as is admitted by appellees' demurrer, and as was granted by the opinion of the Supreme Court of the State of Washington, appellant as agent is, with regard to its Washington State business, engaged solely in the business of creating markets, and selling fruit, for the Wenatchee-Okanogan Cooperative Federation; and all of such fruit, with the exception of a negligible quantity, is sold in commerce among the several states, and with foreign nations. Appellant relieves its principal of the entire task of maintaining out-of-state representation, of negotiating and closing sales for shipment to other states and foreign countries, of executing contracts of sale and of shipment, and of shipping the fruit so sold and collecting the amounts due from buyers.

Under the cases cited herein and the principles established therein, appellant's activities are a component and integral part of interstate and foreign commerce, regardless of whether they are done by it as an agent or an independent contractor.

Real Silk Hosiery Mills v. Portland, supra;

Robbins v. Shelby County Taxing District, supra;

Rearick v. Pennsylvania, 203 U. S. 507, 51 L. Ed. 295;

Crenshaw v. Arkansas, supra;

Crew Levick Co. v. Pennsylvania, supra;

Furst v. Brewster, supra;

McCall v. California, 136 U. S. 104, 34 L. Ed. 391;

Puget Sound Stevedoring Co. v. Tax Commission, supra;

Texas Transport & T. Co. v. New Orleans, 264 U. S. 150, 68 L. Ed. 611.

C

A TAX ON GROSS RECEIPTS IS A DIRECT TAX ON THE ACTS DONE BY APPELLANT.

A tax laid upon gross receipts has long been held to be a direct tax upon the acts from which such receipts are derived. In the dissenting opinion in the case of *Texas Transport & T. Co. v. New Orleans, supra,* it was stated that the burden laid on interstate commerce by a tax is deemed direct

> "where it lays, like a gross receipts tax, a burden upon every transaction in such commerce 'by withholding for the use of the state a part of every dollar received in such transaction' (*Crew Levick Co. v. Pennsylvania*, 245 U. S. 292, 297; 62 L. Ed. 295, 299; 38 Sup. Ct. Rep. 126); or where an occupation tax is laid upon one who, like a drummer or delivery agent, is engaged exclusively in inaugur-

ating or completing his own or his employers' transaction in interstate commerce. (*Robbins v. Taxing Dist.*, 120 U. S. 489; 30 L. Ed. 694; 1 Inters. Com. Rep. 45; 7 Sup. Ct. Rep. 592; *Davis v. Virginia*, 236 U. S. 697; 59 L. Ed. 795; 35 Sup. Ct. Rep. 479)."

Of the numerous cases holding this to be the law, we cite the following:

Philadelphia & S. Mail S. S. Co. v. Pennsylvania, 122 U. S. 326; 30 L. Ed. 1200;

Galveston, H. & S. A. R. Co. v. Texas, 210 U. S. 217; 52 L. Ed. 1031; in which the court, at page 224, 1036, stated that

"In *Philadelphia & S. Mail S. S. Co. v. Pennsylvania, supra*, it was decided that a tax upon gross receipts of a steamship corporation of the state, when such receipts were derived from commerce between the states and with foreign countries, was unconstitutional. We regard this decision as unshaken and as stating established law."

The court thereupon cited several cases subsequent to and in support of the *Philadelphia & S. Mail S. S. Co. v. Pennsylvania.*

See also:

Oklahoma v. Wells, F. & Co., 223 U. S. 298; 56 L. Ed. 445;

Crew Levick Co. v. Pennsylvania, 245 U. S. 292; 62 L. Ed. 295;

United States Glue Co. v. Oak Creek, 247 U. S. 321, 329; 62 L. Ed. 1135, 1141;

Fishers Blend Station v. Tax Commission, 297 U. S. 650, 655; 80 L. Ed. 956, 959;

Puget Sound Stevedoring Co. v. Tax Commission, 302 U. S. 90; 82 L. Ed. 64.

The present taxing act, now in question, seeks to levy directly upon appellant's gross receipts from its interstate and foreign business, a tax which is in fact a tax upon every dollar earned by appellant, which is measured directly by the volume of appellant's business, and which is therefore a direct tax upon and regulation of foreign and interstate commerce, and lays an unlawful burden thereupon, in violation of the Constitution of the United States.

D

DISCUSSION OF THE OPINION OF THE COURT BELOW.

The Court below in its opinion (R. 17), said,

> "The appellant may not successfully invoke the rule that, if a contract of sale requires transportation across state lines, the connection is so close as to render the sale itself immune from taxation. In the case at bar we are not dealing with a sale, but with a contract of agency—a contract for services to be rendered by appellant for the fruit growers." (R. 20.)

This Court has said, in the case of *Puget Sound Stevedoring Co. v. Tax Commission, supra*, that

"The fact is not important that appellant does business as an independent contractor as long as the business that it does is commerce immune from regulation by the states. What is decisive is the nature of the act, not the person of the actor. An independent contractor undertaking to navigate a vessel would have the same protection as a pilot, agreeing to navigate it himself."

In the present case the amount of the tax is governed directly by the volume of sales made by appellant. Regardless of the title given appellant, the tax claimed affects directly the sales made by it, all of which sales are in interstate and foreign commerce.

The court below again said,

"The appellant is a domestic corporation operating, entirely within this state. . . . The tax imposed upon the appellant is not upon imports or exports or interstate or foreign commerce. Appellant is not a necessary factor in such commerce. Appellant renders an independent service — engages in a business within this state. . . ." (R. 20.)

That appellant is a domestic corporation is wholly immaterial in the present controversy. A state may not impose an unconstitutional tax even in the case of a domestic corporation.

Philadelphia & S. Mail S. S. Co. v. Pennsylvania, supra, at 342, 1203;

Ozark Pipe Line v. Monier, 266 U. S. 555, at 567, 69 L. Ed. 439, at 444.

The Court below held that appellant is not a necessary factor in such commerce, but renders an independent service, and is therefore subject to the tax in question. That this is not a controlling fact in the determination of the problem at hand is seen by the *Puget Sound Stevedoring* case, *supra*, wherein an identical holding by the Court below was reversed, by this Court, using the language quoted above. It is likewise true in the instant case, that the services rendered by appellant, no matter by whom they may be rendered, are essential to the marketing of fruit, and without such services appellant's principal could not do business.

The Court below further said:

> "We do not agree with the argument that, as sales of Washington fruit for delivery without the state made directly by appellant's principals are immune from the tax in question, appellant is entitled to the same immunity as it is merely a local agent for growers and associations in this state who have fruit to be sold. If those fruit growers and associations choose to make sales through the medium of an agent or independent contractor, as in the case at bar, the agent's or contractor's activities in this state in making and promoting the sales are subject to state taxation like any other local business." (R. 22.)

Bearing in mind that appellant's sole business is done as agent for the one principal, and that all of the above mentioned sales are in interstate and foreign commerce, whether made by appellant or another, this

quotation illustrates clearly the misunderstanding of the law which prompted the lower court's decision. Again in answer to that court's reasoning, the words of this Court in the *Puget Sound Stevedoring Co.* case are urged:

> *"What is decisive is the nature of the act, not the person of the actor."* (Italics ours.)

As is admitted by appellees, and the Court below, and as is shown clearly by the facts, the acts performed by appellant are in interstate and foreign commerce. Once, therefore, the "independent contractor" theory of the Court below is overcome, there is no basis upon which its opinion can be sustained.

The Court below attempted further to distinguish the present case from the *Puget Sound Stevedoring* case on the ground that stevedoring—the business of loading and unloading—is interstate or foreign commerce, and held, therefore, that decision to be inapplicable to the present case. On the contrary, it is urged herein that the instant case is even stronger than the stevedoring case, for here the appellant operates and has representatives, outside the State of Washington, makes contracts outside of the state, and ships and receives goods outside of the state in its own name. The appellant herein is clearly engaged in interstate and foreign commerce, and all of its acts are a part of that commerce. The rationale of the opinion of the Court

below was not that the acts done by appellant were not such commerce, but rather that since they were performed by appellant as an agent or independent contractor, and regardless of whether the acts were in interstate and foreign commerce, appellant was taxable as a local independent agent or contractor. This reasoning was renounced by the dissenting members of the Court below with the words:

> "The nature of the service is wholly decisive, and whether or not it is rendered by an independent contractor, has nothing whatever to do with the matter." (R. 27.)

The Court below again said:

> "The tax imposed in the case at bar is not directly upon the business itself or upon the volume of business, but upon the amount of commissions earned by the appellant. In principle, the case at bar and *Ficklen v. Shelby County Taxing District*, 145 U. S. 1, 36 L. Ed. 601, 12 S. Ct. 810, are indistinguishable." (R. 23.)

In the *Ficklen* case, the appellant Ficklen had, at the beginning of the year 1887 paid a $50.00 license fee as a general commission merchant, and further gave bond that he would make a return of his gross commissions for the year, in order that a 2½% tax could be levied thereon. He was licensed as a general commission merchant, but at the end of the year, upon discovery that his entire business had been for out-of-state principals, he refused to make a return of his commis-

sions, or to pay the required tax. Ficklen instituted the action to restrain the taxing district from attempting to collect the tax, and alleged a refusal to give him a license for the year 1888. It was held by this Court that having taken out a license in 1887 and given bond to report his commissions and pay the tax upon them, Ficklen could not resort to the courts upon the refusal of the taxing district to issue a new license without payment of the stipulated tax.

Besides holding in the *Ficklen* case that the tax was in effect a property tax, this Court said, at page 21, 606:

> "Although their principals happened during 1887, as to the one party (Ficklen), to be wholly non-resident, and as to the other, largely such, this fact might have been otherwise then and afterwards, as their business was not confined to transactions for non-residents."

And further, at page 22, 606:

> "But here the tax was not laid on the occupation or business of carrying on interstate commerce, or exacted as a condition of doing any particular commission business, and complainants voluntarily subjected themselves thereto in order to do a general business."

It is well to point out here that appellant has never taken out a license under the commission merchants law of this state, upon several grounds, one of which being that it is engaged solely in interstate and foreign commerce. This fact leads directly to the distinction

drawn by the Court in the *Ficklen* case, at page 24, 607, where it is said:

> "What position they would have occupied if they had not undertaken to do a general commission business, and had taken out no license therefor, but had simply transacted business for non-resident principals, is an entirely different question, which does not arise upon this record."

Further, in the *Ficklen* case it was seen that the amount of the tax was not necessarily proportionate to the amount of commission earned, while in the instant case, the tax is governed entirely by the volume of sales made, and is directly proportionate thereto.

In *Brennan v. City of Titusville,* 153 U. S. 289, 306, 38 L. Ed. 719, 724, this Court said:

> "The case of *Ficklen v. Shelby County Taxing Dist.,* 145 U. S. 1, 4 Inters. Com. Rep. 79, is no departure from the rule of decisions so firmly established by the prior cases. At least, no departure was intended, though as shown by the division in the court and by the dissenting opinion of Mr. Justice Harlan, the case was near the boundary line of the state's power. . . . It was thought by a majority of the court that to release them (Ficklen) from the obligations of their bonds on account of the accidental results of the year's business, was refining too much, and that the plaintiffs who had sought the privilege of engaging in a general business should be bound by the contracts which they had made with the state therefor."

See also *Crew Levick Co. v. Pennsylvania,* 245 U. S. 292, at 296; 62 L. Ed. 295, at 299, and *Texas Transport*

& T. Co. v. New Orleans, 264 U. S. 150, 68 L. Ed. 611. For these reasons it is submitted that *Ficklen v. Shelby County Taxing District, supra,* is not proper authority for the holding of the Court below.

The Court below cited and quoted from the case of *American Manufacturing Co. v. St. Louis,* 250 U. S. 459, 63 L. Ed. 1084, in support of its holding. That case is readily distinguishable from the instant case, as from others of like nature, and such was recognized by this Court expressly in its opinion in that case, at page 465, 1088.

The question before the court in the *American Manufacturing Co.* case was whether the City of St. Louis could levy a license tax upon the appellant for the privilege of manufacturing within that city, where the amount of such tax was determined by the volume of appellant's sales, whether local or interstate. This Court, in holding the tax was upon the privilege of manufacturing, stated, at page 463, 1087;

> "The city might have measured such tax by a percentage upon the value of all goods manufactured, *whether they should ever come to be sold or not,* and have required payment as soon as, or even before, the goods left the factory. In order to mitigate the burden, and also, perhaps to bring merchants and manufacturers upon an equal footing in this regard, it has postponed ascertainment and payment of the tax until the manufacturer can bring the goods into market." (Italics ours.)

The tax in that case was clearly upon the privilege of manufacturing, which is admittedly a purely local function, as opposed to the act of selling:

> "So far as he produces or manufactures a commodity, his business is purely local. So far as he sells and ships, or contracts to sell and ship, the commodity to customers in another state, he engages in interstate commerce. In respect of the former, he is subject only to regulation by the state; in respect of the latter, to regulation only by the Federal government. *Utah Power & L. Co. v. Pfost*, 286 U. S. 165, 182, 76 L. Ed. 1038, 1047, 52 S. Ct. 548. *Carter v. Carter Coal Co.*, 298 U. S. 238, 303, 80 L. Ed. 1160, 1185.

The Court below relied upon *Hopkins v. United States*, 171 U. S. 578, 43 L. Ed. 290, in holding that the activities of appellant's representatives outside of the State of Washington are not in interstate or foreign commerce. In *Hopkins v. United States* the solicitors outside of the state, it was stated by this Court, at page 601, 299,

> "have no property or goods for sale, and their only duty is to ask or induce those who own the property to agree that when they send it to market for sale they will consign it to the solicitor's principal . . . the solicitor in this case has no goods or samples of goods and negotiates no sales, and merely seeks to exact a promise from the owner of property that when he does wish to sell he will consign to and sell the property through the solicitor's principal. There is no interstate commerce in that business."

In the present case appellant's representatives are not only in daily telegraphic and telephonic communication with appellant with reference to fruit to sell, but they execute and sign, at their out-of-state locations, the contracts of sale and purchase, in appellant's name. It can hardly be said, as was held by the Court below, that these are Washington contracts, or that appellant's representatives are mere solicitors, of the type involved in *Hopkins v. United States, supra.* Appellant's representatives are rather like the drummer who contracts in one state for the sale of goods which are in another, and which are thereafter delivered in the state in which the contract is made.

In further support of this particular holding, the Court below cited *Blumenstock Bros. v. Curtis Publishing Company,* 252 U. S. 436, 64 L. Ed. 649. The connection between that and the instant case is so remote, and the facts are so different, that it need only be said that in that case the contracts in question made by plaintiff, Blumenstock Bros., did not involve any movement of goods or merchandise in interstate commerce and had no relation thereto, and it was so held by this Court.

We conclude this discussion of the opinion of the Court below with the following excerpt from the dissent to its opinion:

"The majority say that the appellant's business is entirely carried on in this state, and that it is in no sense interstate in character. But when it is admitted that the appellant, acting through its representatives, which is the only way a corporation can act, calls on a dealer in New York or London, negotiates a sale of Washington fruit, makes a contract in its own name, and, subsequently, personally attends to the delivery and collection of the proceeds, I need more than I find in the majority opinion, and more than I think can be found anywhere else, to convince me that these acts are performed in the state of Washington, or that the collection of the freight, for example, is an act in any way differing in nature from a transportation company's collection on a C. O. D. shipment." (R. 28.)

CONCLUSION

From the foregoing we respectfully submit that the imposition of the Business and Occupation Tax of the State of Washington upon the operations of appellant violates Section 8, Clause 3, Section 9, Clause 5, and Section 10, Clause 2, of Article I of the Constitution of the United States, in that such imposition lays an unlawful burden upon interstate and foreign commerce.

Respectfully submitted,

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APPENDIX

Chapter 191, Laws of Washington, 1933

AN ACT relating to taxation; imposing taxes upon the privilege of engaging in business activities * * *.

Section 1. For the purpose of this act unless otherwise required by the context:

* * * * * *

(6) The term "gross income" means the value proceeding or accruing from the sale of tangible property, real or personal, or service or both and all receipts, actually received by reason of the investment of the capital of the business engaged in, including interest, discount, rentals, royalties, fees or other emoluments however designated and without any deduction on account of the cost of property sold, the cost of materials used, labor costs, interest or discount paid or any other expenses whatsoever and without any deduction on account of losses: Provided, The term "gross income" shall not include any payments received on accounts or notes outstanding at the time this act goes into effect.

(7) The word "business" shall include all activities engaged in with the object of gain, benefit or advantage either direct or indirect, and not excepting sub-activities producing marketable commodities used or consumed in the main business activity, each of

which sub-activities shall be considered business engaged in taxable in the class in which it falls.

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Sec. 2. (2) From and after the first day of August, 1933, and until the thirty-first day of July, 1935, there is hereby levied and there shall be collected from every person an *annual tax or excise for the privilege of engaging in business activities*. Such tax or excise shall be measured by the application of rates against values, gross proceeds of sales, or gross income, as the case may be, as follows: (Italics ours.)

* * * * *

(f) (General section imposing tax of six-tenths of one per cent on businesses *not enumerated, vetoed.*)

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Sec. 3. If any person shall engage or continue in any business or the performance of any function for which a *privilege tax* is imposed by this act, he shall be deemed to have applied for and to have duly obtained from the State of Washington *a license under this act to engage in and to conduct such business or perform such function* for the current tax year, upon the condition that he shall pay the tax accruing to the State of Washington under the provisions of this act; and he shall hereby be duly licensed to engage in and conduct such business or perform such a function. (Italics ours.)

Sec. 5. In computing the amount of any tax * * *, there shall be excepted from gross proceeds of sales or gross income so much thereof as is derived *from sales of tangible personal property shipped or transported to points outside of the State of Washington* * * * or from business which the State of Washington is prohibited from taxing under the constitution of this state or the constitution or laws of the United States * * *. (Italics ours.)

* * * * *

Sec. 13. * * * No restraining order or injunction shall be granted or issued by any court * * *, except upon the ground that the assessment thereof was in violation of the constitution of the United States or that of the State of Washington.

* * * * *

Sec. 17. Any person against whom a tax shall have been imposed as herein provided may be restrained and enjoined, * * * from engaging and/or continuing in any business for which a privilege tax is required by the provisions of this act, until such tax shall have been paid and/or until such person shall have complied with the provisions of this act.

* * * * *

Sec. 23. It shall be unlawful for any person to fail or refuse to obtain *the license* * * *. Any person violat-

ing any of the provisions of this section shall be guilty of a gross misdemeanor and punishable in the manner provided by law. * * *

Sec. 24. The administration of this act shall be vested in and exercised by the tax commission which shall prescribe forms and rules, etc. * * *

Chapter 57, Laws of Washington Extraordinary Session, 1933

Section 1. That chapter 191 of the Laws of 1933 be, and the same hereby is, amended by adding thereto a new section, to be known as section 2-a, to read as follows:

Section 2-a. (1) From and after the first day of January, 1934, and until the thirty-first day of July, 1935, there is hereby levied and there shall be collected from every person engaging or continuing within this state in the business of rendering or performing services, professional or otherwise, and from *every person engaging or continuing within this state in any business not specifically taxable* under section 2 of this act, *an annual tax or excise* for the *privilege of engaging* in such business; as to such persons the amount of the tax or excise shall be equal to the gross income of the business multiplied by the rate of five-tenths of one per cent; * * *. (Italics ours.)

Chapter 180, Laws of Washington, 1935

AN ACT relating to revenue and taxation; providing for the levy and collection of a tax or excise upon the act or privilege of engaging in business activities; * * *.

Sec. 4. From and after the first day of May, 1935, there is hereby levied and there shall be collected from every person *a tax for the act or privilege of engaging in business activities.* Such tax shall be measured by the application of rates against value of products, gross proceeds of sales, or gross income of the business, as the case may be, as follows: (Italics ours.)

* * * * *

(e) Upon every person engaging within this state in any business activity other than or in addition to those enumerated in subsections (a), (b), (c) and (d) above; as to such persons the amount of tax on account of such activities shall be equal to the gross income of the business multiplied by the rate of one-half of one per cent. This subsection includes, among others, and without limiting the scope hereof, persons engaged in the following businesses (whether or not title to materials used in the performance of such businesses passes to another by accession, confusion or other than by outright sale); repairing, personal, business, professional, mechanical and educational service busi-

nesses; abstract and title, insurance, financial, brokerage, construction contracting and sub-contracting, advertising and hotel businesses.

Sec. 5. For the purpose of this title, unless otherwise required by the context:

* * * * *

(g) The term "gross income of the business" means the value proceeding or accruing by reason of the transaction of the business engaged in and includes gross proceeds of sales, compensation for the rendition of services, gains realized from trading in stocks, bonds or other evidences of indebtedness, interest, discount, rents, royalties, fees, commissions, dividends, and other emoluments however designated, all without any deduction on account of the cost of tangible property sold, the cost of materials used, labor costs, interest, discount, delivery costs, taxes or any other expense whatsoever paid or accrued and without any deduction on account of losses;

* * * * *

(m) The word "business" includes all activities engaged in with the object of gain, benefit or advantage to the taxpayer or to another person or class, directly or indirectly;

* * * * *

Sec. 12. In computing tax there may be deducted from the measure of tax the following items:

(f) Amounts derived from business which the State of Washington is prohibited from taxing under the constitution of this state or the constitution or laws of the United States.

* * * * *

Sec. 187. If any person shall engage in any business or perform any act for which a tax is imposed by this act, he shall * * * apply for and obtain from the commission, upon the payment of a fee of one dollar, *a registration certificate* for each calendar year, or portion thereof. Said registration certificate shall be personal and non-transferable and shall expire on the last day of the calendar year for which issued and shall be renewed annually upon the condition that the taxpayer shall pay the aforesaid registration fee *and the tax accrued to the state under the provisions of this act.* * * * No person shall engage in any business taxable hereunder without being registered in compliance with the provisions of this section.

* * * * *

Sec. 198. * * * No restraining order or injunction shall be granted or issued by any court or judge to restrain or enjoin the collection of any tax or penalty imposed by this act, or any part thereof, except upon the ground that the assessment thereof was in violation of the constitution of the United States or that of the State of Washington.

Sec. 202. If any tax, increase or penalty imposed by this act, or any portion of such tax, increase or penalty is not paid within fifteen days * * *, the tax commission shall issue a warrant * * * to the sheriff * * *, commanding him to levy upon and sell the real and/or personal property of the taxpayer found within his county * * *. If any warrant issued under this section is not paid within thirty days after the same has been filed with the clerk of the superior court, the tax commission may by order issued under its official seal, *revoke the certificate of registration* of the taxpayer * * *. (Italics ours.)

* * * * *

Sec. 207. It shall be *unlawful* for any person *to engage in business without* having obtained a *certificate of registration* as provided herein; or to *engage* in business *after* his *certificate* of registration shall have been *revoked* by order of the tax commission; * * * or for the president, vice-president, secretary, treasurer or other officer of any company to carry on the business of any company which has not obtained a certificate of registration or whose certificate of registration has been revoked by order of the tax commission * * *. Any person violating any of the provisions of this section shall be guilty of a gross misdemeanor and punishable in the manner provided by law. * * * (Italics ours.)

Sec. 216. No tax shall be imposed under the provisions of chapter 191, Laws of 1933, as amended by chapter 57, Laws of 1933, Extraordinary Session, with respect to the period beginning May 1, 1935, and ending July 31, 1935, and the provisions of such act shall be deemed amended in conformity herewith. Nothing contained in this section shall affect the liability of any person subject to the provisions of said chapter 191, as amended, for the payment of tax imposed thereunder for any period prior to May 1, 1935, and no action or proceeding for the collection of tax, lien or claim for tax or action involving the validity of tax imposed under the provisions of said act shall be affected hereby and all remedies for the assessment and collection of taxes, penalties and interest under the provisions of said act shall be and remain in effect until such time as all taxes imposed thereunder shall have been paid or collected.